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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 444

BENJAMIN BELL,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND SUPPORTING BRIEF

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IN THE

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OCTOBER TERM, 1950

No. .....

BENJAMIN BELL,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

(Figures in ( ) refer to Record).

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner Benjamin Bell prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit rendered on November 8th, 1950, affirming the judgment of the District Court of the United States for the District of Maryland at Baltimore on May 17th, 1950, adjudging the Petitioner guilty of wilfully and knowingly attempting to evade payment of income taxes for the years 1943, 1944 and 1945. The Petitioner was sentenced to imprisonment for a period of six months and fined the sum of $17,500. The Petitioner was released on bail.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at page 258 of the Record. There was no opinion in the District Court of the United States for the District of Maryland, at Baltimore.

JURISDICTION

Jurisdiction is invoked under Section 1254 (1) of the Judicial Code, 28 U. S. C. A. Sec. 1254 (1).

STATUTE INVOLVED

The Revenue Acts of (Feb. 26) 1936 and (May 28) 1938, now embodied in general form in Par. 145 (b) of the Internal Revenue Code 53 Stat. 53; Title 26 U. S. C. A. Sec. 145 (b); 6 F. A. C. Title 26 Par. 145 (b).

QUESTIONS PRESENTED

1. The ruling of the United States Court of Appeals for the Fourth Circuit in this case of *Benjamin Bell v. United States* is in direct conflict with the ruling in the United States Court of Appeals for the Fifth Circuit in the case of *Bryan v. United States,* 175 F. (2) 223 (1949), and the ruling of the United States Court of Appeals for the Seventh Circuit in the case of *United States v. Fenwick,* 177 F. (2) 488 (1949).

2. The ruling of the United States Court of Appeals for the Fourth Circuit in this case of *Benjamin Bell v. United States* decided:

> That a naked net worth statement with its base year not clearly and accurately established by competent evidence, and with each year replete with errors, is sufficient evidence to convict a citizen of alleged tax evasion, without the Government offering a scintilla of direct evidence showing any unreported source of income.

This decision has determined an important question of Federal Law which should be settled by the Court.

3. The ruling of the United States Court of Appeals for the Fourth Circuit has so far departed from the accepted and usual course of judicial procedure, and has so far sanctioned such a departure by the District Court of the United States for the District of Maryland at Baltimore as to call for the exercise of this Court's power of supervision. The departure from the accepted and usual course of judicial procedure was the action of the District Court in limiting the scope of cross examination so that the defendant was not even allowed to cross examine within the scope of the Government's direct examination.

(a) By refusing to allow the defendant to cross examine the Special Agent in order to ascertain what the Agent found in the Defendant's safe deposit box.

(b) By refusing to allow the defendant to cross examine the Special Agent in order to ascertain what the defendant's check book, check stubs and bank books showed relative to the Defendant's income and related matters;

(c) By refusing to allow the Defendant to cross examine the Special Agent with reference to a bank book of the Defendant showing the Defendant's rentals;

(d) By refusing to allow the Defendant to cross examine the Special Agent about his failure to answer a letter directed by special delivery to the Agent by the Attorney for the Defendant, in which letter were statements in direct conflict with the Agent's testimony on the stand;

(e) By refusing to allow the Defendant to cross examine the Special Agent with regard to whether the Agent

had not in the net worth statement charged the Defendant with income in 1943 which was in fact income in 1942, and on which the Defendant had paid a tax for the year 1942.

(f) By refusing to allow the Defendant on cross examination to ascertain what schedules and other information were furnished, and what other persons were used by the Government in preparing the net worth statement;

(g) By refusing to allow the Defendant to cross examine the Special Agent about three checks which show on their face that they were deposited in the Defendant's bank account, and which checks constituted an item of $15,000 for which the Agent charged the Defendant twice in 1944 as income.

Conclusion

The action of the District Court and the Circuit Court in this case has deprived the defendant of his liberty without due process of law.

SUMMARY AND SHORT STATEMENT

The Defendant is Benjamin Bell who, since 1933, has been the owner of the Washington Art Galleries and Auction Rooms, Inc., a body corporate, located at 722 Thirteenth Street, Washington, D. C. (7).

To prove the Defendant guilty of tax evasion, the Government offered in evidence a consolidated net worth statement of the Defendant and his wife, prepared by a Special Agent — one Knight — in conjunction with others. The Government did not offer a scintilla of direct evidence of unreported income. The Special Agent admitted he found no unreported source of income. The Government's case

was a naked net worth case predicated on the consolidated net worth statement. This net worth statement purported to show consolidated assets and liabilities for the years 1942, 1943, 1944 and 1945. This net worth statement was replete with errors. The base year for this statement was 1942. It was against this base year (showing alleged consolidated net worth in 1942) that all alleged increases in earned income were measured. The base year must be accurate if subsequent alleged increases in net income are to be accurate. The accuracy of this base year, and subsequent years, can be judged from the following:

(a) *The Net Worth Statement omitted in its computation two calendar months or one-sixth of the Defendant's business operations for the base year of 1942 as well as each subsequent year.*

The Washington Art Galleries and Auction Rooms, Inc., was owned by the defendant, and was the primary source of the Defendant's income. This Corporation kept its books and paid its taxes on a fiscal year basis from October 31st of one year to October 31st of the following year. The Defendant paid his taxes on a calendar year basis. Notwithstanding this fact, Special Agent Knight, in computing the Defendant's net worth at the close of the calendar years 1942, 1943, 1944 and 1945, included in the Defendant's net worth his assets and liabilities, with the computation as of October 31st of each of said years, and did not adjust said assets and liabilities as of December 31st of said years. These items include balance of salary owed the Defendant, balance of rent owed the Defendant, balance owed Defendant on his trading account under the name of Mount Vernon Galleries, and any other amounts owed the Defendant by the Corporation, as well as any amounts owed to the corporation by the Defendant (43-46); for example,

in determining loans receivable by the Defendant from the corporation, Special Agent Knight took the figure of $27,072.43 from the books of the corporation as of October 31, 1942, not as of December 31, 1942 (139), alleging as a reason that the final statement for the corporation was not made up until the year had passed (139-140), although at the time he made up the net worth statement the years 1942, 1943 and 1944 had passed and he had the information (140), since the statement was made up some time after he first saw the Defendant in 1946.

(b) *The Consolidated Net Worth Statement did not show any cash accumulations in the base year 1942 since it did not accurately measure or determine either the amount of accumulated cash of the Defendant, or the amount of accumulated cash of his wife.*

This is clearly shown by the following:

> "Q. (Mr. Anderson) March 28th, 1946, did you ask Mr. Bell if he had any currency on hand in 1942? A. I don't recall that I did, no sir.
>
> Q. Did you ask him whether he had any currency on hand in 1943? A. No, sir, I don't recall that I did.
>
> Q. Or in 1944? A. I believe—may I retract that. I believe that I did, Your Honor, and it was stated he would get the small amounts which were not sufficient before making deposits, and that would not be in the statement, but that is something oral" (101).

Special Agent Knight had taken a question and answer statement from the Defendant (101) to which he added a page, in longhand (102) in his own handwriting (102), and while the matter of cash on hand was important (103) *he left it out of this report* (103). (Italics supplied).

The net worth statement was a consolidated statement of the Defendant and his wife, but Special Agent Knight

never asked Mrs. Bell whether she had any cash on hand in 1942, 1943, 1944 and 1945, or whether she had any accumulated cash in 1942.

(c) *The consolidated net worth statement did not accurately measure or determine what was due and owing by the defendant or by his wife in the base year 1942.*

This is clearly shown by the following:

> "Q. And at that time did you ask whether Mr. Ben Bell, who was under investigation, owed any money? A. May I refer to that question and answer statement which I took that day?
>
> Q. You have no independent recollection without referring to the question and answer statement? A. Yes, there is a question there I asked him it. I believe it is on the second page.
>
> Q. The top question? A. Yes.
>
> Q. (Mr. Anderson) This is the question isn't it: 'Did you have any loans due from other persons outstanding since January 1936'? A. The answer is no.
>
> Q. That is correct. It is not whether you owed anybody, but it is loans due from anybody; is that correct? Is that what it says: Did you have any loans due from anybody? A. That is correct" (103-104).

The Special Agent never questioned Mrs. Bell about anything, and hence never questioned her about any debts which might be due and owing by her.

(d) *Other Errors and Mistakes in the Net Worth Statement for the Base Year 1942.* The Defendant's 1942 return shows that in 1942 the Defendant received a certain liquidating dividend in the matter of Morton H. Goldberg in the amount of $4,635.61, of which 80% or $3,708.09 belonged to the Defendant and the balance to someone else. The Defendant paid income tax on the $3,708.09 in 1942 (132-133) but Special Agent Knight did not include this

as an asset in the Defendant's net worth statement (133) for 1942 (133) but added it, instead, to the 1943 net worth statement (134), to form a part of increased net worth in 1943 over the base year 1942. The net worth statement was a consolidated statement, but Special Agent Knight did not include as an asset in 1942 a saving account of $360. of Mrs. Bell in the National Metropolitan Bank (136), nor did he give the Defendant credit as a cash asset for salary in the amount of $6,000 earned in 1942 (136-137) paid by the Galleries to the Defendant and shown on the Galleries books as salary earned in 1942 (Exhibit 6), nor did he include Government bond in the amount of $1200. in the name of Mrs. Bell (137), nor did he give the Mullen Manufacturing stock a value (138); nor did he give the Defendant credit for $3,021.72 money due from Orvis Bros. (138).

(e) *The accuracy of the Net Worth Statement for the years 1943, 1944 and 1945 can be judged from the following:*

In these years, Special Agent Knight did not give the Defendant credit for 100 shares of Jones and McLaughlin stock in the amount of $2,852.70 (140) but he charged the Defendant with 500 shares of Pittston Company stock which stock he did not have (144). He charged the Defendant with gross insurance premiums, not gross premiums minus dividends, as was actually paid (147-148) although he had the Defendant's checks and had analyzed them.

In the net worth statement he placed a $1,000 bond in the wrong year (153-154). At the end of 1944 he charged the Defendant with $45,000 the full value of certain real property in Atlantic City, without giving him an offset of $16,825. paid in 1944 as a deposit on a contract to sell this property (153-160), which the settlement sheet showed

was paid on account of the sale (160), and which the witness presumed was deposited in the Defendant's bank account (154), and the bank account itself shows a deposit of $15,000 shortly after this time. Special Agent Knight just took the Defendant's bank balance for December 31, 1945, at the wrong figure (55-56). The balance was actually $1,303.59, but the Agent had it as $2,482.14, and in 1945 he did not credit the Defendant in the Marcus matter with $333 and $463.65 which had been paid the Defendant by two other persons in connection with this matter (160).

(f) *Books and Records of the Defendant*—The Defendant's source of income are: commissions from the Galleries, rentals, some dividends, a few long term capital gains, plus salary from the Galleries (110-111). The Defendant's records and books showing this income are as follows:

Corporate Books—The corporate books consist of (a) a Journal (Exhibit 5) showing cash receipts (9) expenses and mixed accounts from which profit and loss statements are prepared (10); a daily cash book (Exhibit 7) showing individual daily sales; the amount of each sale and to whom each sale was made (11-13); and (c) a general ledger (Exhibit 6) which contains a personal account of the Defendant showing what, if anything, the corporation owed the Defendant (16); a rental account, showing rental charges for the place of business occupied by the corporation (16); a storage account, and the Defendant's trading account, labelled "Mt. Vernon Galleries (17); (Note: The government witness constantly confused the journal (Exhibit 5) with the ledger (Exhibit 6) (9-14).

Personal Books and Records—Personal books and records were: a personal bank book showing rentals (other than gallery rental shown on corporate books)

salary, exchanges and so on (116); cancelled checks and check stubs; personal income, tax returns, showing all capital gains or losses. Special Agent Knight never asked the Defendant for his settlement sheets on his real estate transactions (117). Special Agent Knight stated that in his opinion the corporate books plus the personal books were inadequate because "the corporation was on a fiscal year basis whereas Mr. Bell is on a calendar year basis", and because "there was no invoice or tape which substantiated the books of the corporation" (19). He admitted that the daily cash book (Exhibit 7) details each day's individual sales; the individual amount of each sale, and the name of the purchaser (122); the day's total is entered in the Journal (121-122) and can be checked against bank deposits and bank statements (123).

(g) *Preparation of Net Worth Statement* — Special Agent Knight stated that after making up the net worth statement the original work sheets were no longer of any use (95-96) and he did not have them (95). He "presumed they were" in his handwriting "if he made them they were" (96). Mr. Cunningham, Certified Public Accountant attached to the Bureau worked with Special Agent Knight, and some of the work sheets were in Mr. Cunningham's handwriting (96), so that some of the work sheets and figures from which the final account was made, were in Mr. Cunningham's handwriting and some were in Special Agent Knight's handwriting (96); that the net worth statement represents their joint work (96). Mr. Cunningham made up the item of the net worth statement headed "Less non-taxable portion long-term capital loan" (73), and Special Agent Knight could not explain it without referring to Mr. Cunningham's report. Mr. Cunningham did not testify in the case.

(h) *The Unsigned Statement*—On or about November 21, 1946 (126), Mr. Bell was presented at his place of business with a statement by Special Agent Knight and another agent, purporting to set forth an interview with Mr. Bell on October 11. Mr. Bell refused to sign this statement because of alleged errors in the same (127) calling his lawyer, Mr. Hart, who shortly came to the place of business and advised against signing because of the errors (128). Mr. Hart arranged for a subsequent conference on the following Monday (130) at which time a Court Stenographer was to be present (129). This appointment was later broken by Special Agent Knight (130) following which Mr. Hart immediately wrote Special Agent Knight with reference to this matter (130). This letter was never answered. On objection by the Government, the Defendant was not allowed to cross-examine Special Agent Knight with respect to this letter (130-132), or even mark the letter for identification. (The letter is attached to the Brief as Appendix A).

(i) *Further Errors of the Special Agent*—Special Agent Knight stated concerning his first interview with the Defendant — "At this time I learned that he owned real estate", mentioning four properties. On cross examination it developed that at this time Special Agent Knight had the Defendant's return for the years 1942, 1943 and 1944, which returns showed on their face the Defendant's real estate holdings and the income therefrom; that he had been investigating this case since 1946 and that immediately upon being given the Defendant's 1945 return, he turned it over to see that it showed a certain real estate transaction which it did.

Special Agent Knight stated that he charged the Defendant's wife's real estate at 9707 Georgtown Road, valued at some $16,000., to the Defendant because the Defendant

said he furnished the money deposited in his wife's bank account, and the property had been paid for out of this bank account. When asked to show that the $16,000 paid by Mrs. Bell for her real estate had cleared through her bank account he was totally unable to do so, although he had before this referred to all her bank statements (150-152).

It is with a net worth statement replete with the above errors, and with an inventory of only $8,650.00 (145) that the Government charges the Defendant with a net income in 1943 of $63,836.00, in 1944 of $41,115.00 and 1945 of $25,203.00.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The reasons relied upon are:

(a) The decision of the United States Court of Appeals for the Fourth Circuit in this case of *Bell v. United States* is directly in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in the case of *Bryan v. United States*, 175 F. (2) 223 (1949) and the decision of the United States Court of Appeals for the Seventh Circuit in the case of *United States v. Fenwick*, 177 F. (2) 488 (1949).

(b) The United States Court of Appeals for the Fourth Circuit has decided that:

> A naked net worth statement with its base year not clearly and accurately established by competent evidence, and with each year replete with errors, and without a scintilla of direct evidence showing any unreported source of income is sufficient evidence to sustain a conviction of alleged tax evasion.

This decision has determined an important question of Federal law which should be finally decided by this Court.

(c) The Defendant was so limited in cross examination in a criminal case that this Court should intervene in the exercise of its supervisory powers.

(d) The action of the District Court and the Circuit Court by the above rulings has deprived the Defendant of his liberty without due process of law.

CONCLUSION

WHEREFORE for the reasons stated in the petition and in the annexed brief, it is respectfully submitted that the Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit herein prayed should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. .....

BENJAMIN BELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ARGUMENT

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THIS CASE OF *BENJAMIN BELL V. UNITED STATES* IS IN DIRECT CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN THE CASE OF *BRYAN V. UNITED STATES*, 175 F. (2) 223 (1949), AND THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THE CASE OF *UNITED STATES V. FENWICK*, 177 F. (2) 488 (1949).

The issue herein raised is a vital issue. It is — Is a mere increase in net worth in a given year proof that the increase

in net worth was earned income in that year? In both the *Bryan* case, supra, and the *Fenwick* case, supra, it was specifically held that a mere increase in net worth did not prove that this increase was earned income. The following is a comparison of *Bryan v. United States,* 175 F. (2) 223 (5th Cir. 1949), and the *Bell* case now under consideration:

Bryan Case	*Bell Case*
1. Years for which indicted — 1942-1943-1944.	1. Years for which indicted — 1943-1944-1945.
2. Evidence clearly showed that the defendant spent more money during indictment years than reported in his gross income.	2. Exactly the same evidence.
3. Defendant's capital assets increased in proportion to expenditures in excess of gross receipts.	3. Exactly the same evidence.
4. Defendant contends that in spite of this fact the Government's case failed to show that the expenditures in excess of gross income came out of current assets.	4. Exactly the same contention.
5. The Auditor for the Bureau computed net worth from records of conveyances, sales, mortgages, bank deposits, returns, and such other information as he could find and which he considered reliable.	5. Exactly the same evidence.
6. Auditor's statements were to the effect that the net worth statement contained all the Defendant's assets which he, an auditor of much experience could find.	6. Exactly the same evidence.

In the *Bryan* case, the Defendant was found guilty in the lower Court which finding was reversed on appeal, the

United States Court of Appeals for the Fifth Circuit holding at page 227:

> "The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the defendant * * * The case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income."

The case of *U. S. v. Fenwick,* 177 F. (2) 488 (7th Cir. 1949) can be compared with the *Bell* case just as the *Bryan* case was compared with the *Bell* case. The comparison will be exactly the same except that in the *Fenwick* case there were extra-judicial admissions tending to show defendant guilty of evasion, whereas in the Bell case the only extra-judicial statements of Defendant were to the effect that he had not evaded tax, and explained his increase in net worth. Hence the evidence in the *Fenwick* case was stronger by far than the evidence in the Bell case.

In the *Fenwick* case, the United States Court of Appeals for the Seventh Circuit carefully framed the issue—177 Fed. (2) 488 at 489—as follows:

> "The government insists that it has proved that defendant wilfully evaded payment of tax in each year by evidence that in each year defendant's net worth increased to an amount greater than his reported income and by evidence of expenditures in excess, as it says, of defendant's disclosed incomes."

Having raised this specific issue the Court conclusively answers the same 177 F. (2) 488 at 488-490:

> "In such a situation we must keep in mind that the conviction can not stand unless there is proof of the corpus delicti, existence of which cannot be presumed or established by an extrajudicial admission. The

> government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed. *Pines v. United States,* 8th Cir. 123 F. 2d 825, 829; *Forte v. United States,* 68 App. D. C. 111, 94 F. 2d 236, 243, 127 A. L. R. 1120; *Gardinier v. United States,* 9th Cir. 261 F. 910, 912; *United States v. Chapman,* 7 Cir. 168 F. 2d 997 at page 1001. In the latter case we said: 'Appellant contends that, "In a 'net worth case', the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to convict." We fully agree with his statement of the law.' In other words to justify the conviction, there must be proof beyond reasonable doubt and exclusive of any express or implied extrajudicial admission by defendant, that defendant evaded some income tax."

After quoting with approval from the *Bryan* case, supra, the Court held that the Government had failed to prove its case.

These two cases are in direct conflict with the *Bell* case. This conflict between the Courts of the Fifth, Seventh and Fourth Circuits is a serious conflict since it involves a criminal statute and hence the liberties of individual taxpayers. In the Fifth and Seventh Circuits the Defendant would be free; in the Fourth Circuit the Defendant is sentenced to the Federal Penitentiary.

There Were No Cases Contrary to the Bryan Case and Fenwick Case Until the Bell Case

In every net worth case to date (with the exception of the *Bell* case) in a Court of final resort, a mere increase in net worth has been held insufficient to sustain a conviction unless, in addition to the net worth statement, there was evi-

dence of one or more of the following factors, which factors prove or tend to prove tax evasion.

A—Proof that the Defendant has been paid or received some specific money which he has failed to report:

Oliver v. U. S., 54 F. (2) 48;
Nicola v. U. S., 72 F. (2) 780;
U. S. v. Chapman, 168 F. (2) 997;
Brodella v. U. S., CCH Advance Sheets, 1950 2 USTC Par. 9477, p. 13,280.

B—Proof of unexplained regular day by day; month by month bank deposits of a nature consistent with business income:

U. S. v. Miro, 60 F. (2) 58;
Gleckman v. U. S., 80 F. (2) 394;
Barcott v. U. S., 169 F. (2) 929;
Jelaza v. U. S., 179 F. (2) 202.

C—Proof of specific undisclosed sources of income, showing that defendant was engaged in some business (usually illegal) other than the business disclosed in defendant's income tax return.

Chadwick v. U. S., 77 F. (2) 961;
U. S. v. Wexler, 79 F. (2) 526;
Paschen v. U. S., 70 F. (2) 490;
Malone v. U. S., 94 F. (2) 281;
U. S. v. Skidmore, 123 F. (2) 604;
U. S. v. Potson, 171 F. (2) 495.

D—Proof of specific acts of Defendants showing attempts to evade income tax by destruction of books of account, keeping of two sets of books, failure to keep any books or records, attempt to bribe agent, etc.

Guzik v. U. S., 54 F. (2) 618;
Kitrell v. U. S., 79 F. (2) 259;
Stinnett v. U. S., 173 F. (2) 129;
U. S. v. Schuermann, 79 F. (S) 247;
Schuermann v. U. S., 174 F. (2) 397.

The rationale of all these cases is that an increase in net worth standing alone, is not proof of earned income to sustain a conviction. Running through these cases will often be found the following quotations from the *Gleckman* case supra at 399, quoted with approval in many of the above cases.

> "It may be conceded also that the bare fact standing alone that a man has deposited a sum of money in a bank would not prove that he owed income tax on the amount; nor would the bare fact that he received and cashed a check for a large amount, in and of itself, suffice to establish that income tax was due on the amount of it."

In many of the above cases, net worth, was only incidental to the main case which was essentially a criminal prosecution against gangsters and racketeers. Net worth only tended to reinforce what positive evidence had proved.

Capone v. U. S., 51 F. (2) 609;
U. S. v. Wexler, 79 F. (2) 526;
U. S. v. Johnson, 319 U. S. 503; 87 L. Ed. 1547.

Alleged Extrajudicial Admissions By a Defendant Are Not Proof to Sustain a Conviction

The agent testified to certain alleged admissions of Defendant to the Agent at two interviews, one on March 28, 1946, and one on October 11, 1946. It is of interest to note that although the interview of March 28, 1946, was reduced to writing and signed by Defendant (105), it was never offered in evidence by the Government, and in fact the Government even objected to the Defendant's having it marked for identification (105). The interview of October 11, 1946, was taken down stenographically but Defendant refused to sign the transcript because of errors contained therein (127-132).

The so-called admissions were actually statements of fact showing the source of income, which statements the Government did not choose to believe, but which statements were never in any way denied. These statements were not admissions of evasion but specifically denied evasion. Thus in this case there are no harmful admissions, but even if there were harmful admissions, the evidence would not be sufficient to sustain a conviction.

The effect of extrajudicial admissions in connection with net worth cases was specifically passed upon in *United States v. Fenwick,* 177 F. (2) 488, wherein the Court at 490 said:

> "In other words, to justify the conviction there must be proof beyond reasonable doubt and exclusive of any express or implied extrajudicial admission by the Defendant that the Defendant evaded some income tax. *Gleckman v. U. S.,* 8th Cir. 80 F. (2) 394, 399; *United States v. Miro,* 2nd Cir. 60 F. (2) 56, 60; *O'Brien v. United States,* 7th Cir. 51 F. (2) 193-196."

The above doctrine was cited with approval in the earlier tax case of *U. S. v. Chapman,* 168 F. (2) 997 at 1001. This is in direct conflict with the action of the Fourth Circuit in the *Bell* case at pages 10 and 11 where the Court uses alleged admissions (statements of fact never disproved) to justify the admission in evidence of the net worth statement.

The Government's Case is Predicated Upon an Inference on an Inference on an Inference

These inferences are: (a) That the increase in net worth is earned income; (b) That it is earned income in the years 1943, 1944 and 1945; (c) That it is not an accumulated or non-taxable increase; (d) that the Defendant's books, in which no errors were found, must be wrong; (e) that there

must be some unreported income not shown on the books; (f) that there was a wilful attempt to evade. There is not a scintilla of direct proof of any of these factors.

The United States Court of Appeals for the Fourth Circuit is placed in the unique position of rejecting positive evidence by indulging in an inference, which inference has no foundation by intimation or imagination in the record. At page 9 of the Court's opinion, in attempting to answer the Defendant's contention with respect to alleged net earnings of the Defendant in the amount of $60,000. on an inventory of $8,650., the Court says:

> "There is no substance to the defendant's contention that the net worth statement is so incredible as to be inadmissible because it discloses profits that could not possibly have been earned upon the small inventory of $8,650. shown on the corporation's books. *The profits on an auction business are made for the most part on the sale of goods of other persons and not upon the profit to the auctioneer.*" (Italics supplied.)

There is not a scintilla of evidence in this record about "profits on an auction business are made for the most part on sales of goods of other persons and not upon the profit to the auctioneer." Thus the Court not only imported out of its collective imagination some unknown profits by way of inferences, but further inferred the amount of these profits. It is the use of an inference not only to supply a missing factor in a case, but the use of an inference on an inference to contradict positive factual evidence to the contrary.

In *U. S. v. Cole*, 90 F. (S) 147 (a case involving alleged income and estate tax evasion) the Court in granting the Defendant's motion for acquittal specifically discussed this question. It compared the inferences to be drawn in that case to inferences drawn in a narcotic case, stating at pp. 156-157 as follows:

> "The Government had sought to prove unlawful prescription of narcotics from mere possession. The Court said that from the possession of narcotics, it would have to infer illegal possession, and from that illegal possession, it would have to infer an intention to violate the law in giving prescriptions when sound medical practice did not warrant it. They quoted from one of their own prior opinions: Such double inferences are too remote to constitute evidence. As was said by the Supreme Court in *United States v. Ross,* 92 U. S. 281, 283, 23 L. Ed. 707; 'There are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally inadmissible."

By allowing an inference to be predicated on an inference, the conviction violated an elemental principle of criminal law in the Federal Courts. This principle has been repeated many times in the same words so lately repeated in *Bryan v. U. S.,* 175 F. (2) 223 at 227:

> "The evidence being circumstantial must exclude every reasonable hypothesis other than the guilt of the defendant."

The Government's Case Shifts the Burden of Proof from the Government to the Defendant

If an increase in net worth is sufficient evidence to sustain a conviction of tax evasion, then instructions with respect to "burden of proof" and "reasonable doubt" as set forth in the older cases, such as *Coffin v. U. S.,* 157 U. S. 432 at 453, 39 L. Ed. 481 at 492 recently repeated in substance in *Spies v. U. S.,* 317 U. S. 492, 87 L. Ed. 418, are nothing but lip service to a judicial mirage. In *Coffin v. U. S.,* 157 U. S. 432 at 453, 39 L. Ed. 481 at 492, Mr. Justice White speaking for the Court said:

> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law,

axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

It is stated as unquestioned in the textbooks, and has been referred to as a matter of course in the decisions of this court and in the courts of several states.

* * * * * *

Ammianus Marcellinus related an anecdote of the Emperor Julian which illustrates the enforcement of this principle in the Roman law. Numerius, the governor of Narbonensis, was on trial before the Emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, 'a passionate man', seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, 'Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty'? to which Julian replied, 'If it suffices to accuse, what will become of the innocent'?"

If increased net worth is sufficient to sustain a conviction, then the burden of proof has shifted from the Government to the Defendant. The burden is then on the Defendant to prove that the increase is *not* earned income, instead of being on the Government to prove that the increase *was* earned income. The burden of proof is then shifted to the defendant to prove that the income came from non-taxable sources, such as

(1) Cash assets accumulated prior to January 1, 1943. There is no proof that the property admittedly owned by the Defendants at the beginning of 1943 constituted all the assets they had at that date.

(2) From the following sources (see Revenue Act of 1938 as amended, Part II, Section 22(b) relating to exclusions from gross income):

(a) Life insurance
(b) Annuities
(c) Gifts, bequests and devises
(d) Tax free interest
(e) Compensation for injuries or sickness (and other miscellaneous exceptions set forth in the above section).

The opinion in the *Bell* case (in spite of protestation to the contrary) graphically shows how the Court has shifted the burden of proof. The Special Agent found no errors in the Defendant's books, and no evidence of unreported income, but the Court shifts the burden to the Defendant to prove that the books are correct. The burden is shifted from the Government to prove the Defendant's records are wrong, to the Defendant to prove that the Defendant's records are right.

A most flagrant example is found on pages 10 and 11 of the opinion in the *Bell* case. The Court here first speaks of Defendant's admissions; a few lines further these admissions become a confession, and then the confession is used to make the net worth statement admissible. Actually the record shows there was no confession or admissions. The Defendant made certain statements about gifts and loans. These statements the Court disbelieved. The Government produced no positive evidence to disprove these statements although it had ample opportunity to try to do so. However, under the doctrine of the *Bell* case, the burden is on the Defendant to prove these statements true, since they will be assumed to be false until proved true by the Defendant. If such be the law, then the entire concept of "due process of law" no longer exists. Moreover, as set forth in the *Fenwick* case, supra, they cannot add anything to a net worth case.

The Bryan Case and the Fenwick Case are Supported By the Supreme Court in U. S. v. Johnson, 319 U. S. 503, 87 L. Ed. 1547

In *U. S. v. Johnson,* 123 F. (2) 111, reversed 319 U. S. 503, 87 L. Ed. 1547, the Defendant was a big time gambler. He was charged with an attempt to evade income taxes. The Government's case was predicated on two grounds:

a. The aggregate income from certain gambling houses for the years involved, was traceable to him; and

b. Expenditure methods (a form of net worth).

He was found guilty in the District Court. On appeal the Circuit Court found that the Government had not proven (a) but did prove (b), but reversed the conviction on other grounds relating to the indictment.

The Supreme Court made the exactly opposite finding. The Supreme Court found that the Government had proved (a) and that (b) merely "reinforced" (a). While "the devil himself knows not the mind of a man" the Supreme Court carefully refrained from a holding that increased net worth alone proved guilt of evasion, and hence confined the case to the usual and typical tax evasion cases. The Supreme Court did exactly the reverse, holding that illegally traced income was the essential element in the case, and that net worth was merely incidental thereto. (The case was reversed on other ground).

Conclusion

There is a direct conflict in the Circuits. As hereinbefore set forth, the facts of the *Bryan* case, supra, the *Fenwick* case, supra, and the *Bell* case, supra, are identical. In the Fifth and Seventh Circuits, the Defendant goes free on identical facts, and in the Fourth Circuit, the Defendant goes to jail. The *Fenwick* case specifically held that extra-

judicial statements, even though damaging, when coupled with a net worth statement, will not be sufficient evidence to sustain a conviction. To the exact contra, the United States Court of Appeals for the Fourth Circuit in this *Bell* case admits these extra-judicial statements into the evidence, and even though these statements are denials of evasion, couples these statements with the net worth statement, to sustain a conviction.

WHEREFORE it is submitted that this Court should exercise its jurisdiction in order to settle this conflict.

II.

A NAKED NET WORTH STATEMENT WITH ITS BASE YEAR NOT CLEARLY AND ACCURATELY ESTABLISHED BY COMPETENT EVIDENCE, AND WITH EACH YEAR REPLETE WITH ERRORS IS NOT SUFFICIENT TO SUSTAIN A CONVICTION OF ALLEGED TAX EVASION WITHOUT THE GOVERNMENT OFFERING A SCINTILLA OF DIRECT EVIDENCE OF UNREPORTED INCOME.

It is axiomatic that the base year of a net worth statement must be accurate. On the base year is predicated all subsequent calculations. If this base year is inaccurate all subsequent calculations are inaccurate. As stated in *U. S. v. Fenwick*, 177 F. (2d) 488, at 490:

> "Of course, before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence."

The reason for this basic rule is graphically set forth in *Brodella v. U. S.*, Advanced Sheets CCH 1950 2-USTC, p. 13,280 at 13,281, where it is stated:

> "This is true because if the reported net worth of the taxpayer at the beginning of the taxable year does not include all of the taxpayer's assets or property, the increase in net worth in subsequent years could come out of the prior existing assets not so included."

See also *U. S. v. Chapman,* 168 F. (2) 997 at 1001; *U. S. v. Skidmore,* 123 F. (2) 604 at 608, and *Bryan v. U. S.,* 175 F. (2) 223 at 225.

The Net Worth Statement for the Base Year 1942 Was Not Clearly and Accurately Established by Competent Evidence But Was Admittedly Inaccurate and Replete With Errors

The net worth statement for the year 1942 was not clearly and accurately established by competent evidence, but was inaccurate and replete with errors as evidenced by the following:

A—*It did not pretend to accurately take into consideration cash accumulations by the Defendant and his wife* — The statement was a consolidated net worth statement of the Defendant and his wife. Cash accumulation was a matter of little interest to the agent who made up the statement as is clearly evidenced by the testimony of the Agent himself.

> Q. (Mr. Anderson) March 28th, 1946, did you ask Mr. Bell if he had any currency on hand in 1942? A. I don't recall that I did, no sir.
>
> Q. Did you ask him whether he had any currency on hand in 1943? A. No, sir, I don't recall that I did.
>
> Q. Or in 1944? A. I believe — may I retract that I believe that I did, Your Honor, and it was stated he would get the small amounts which were not sufficient before making deposits, and *that would not be in the statement,* but that is something oral" (101). (Italics supplied).

The agent admitted he never asked whether defendant's wife had cash accumulations in 1942, 1943, 1944 or 1945 (103). The situation is as follows:

(a) The agent isn't sure whether he asked about cash accumulations or not (although cash accumulations are of vital importance in cases of this kind);

(b) if he did ask about this vital factor, he cared so little about it that he neglected to put it in his statement, as he said "that would not be in the statement", in spite of the fact that part of the statement was written out by him in longhand; and

(c) the agent never asked whether Mrs. Bell had any cash or not. He stated that the Defendant said that any money his wife had she obtained from the Defendant. The agent made no attempt to ascertain what she might have accumulated in this way from the Defendant; when she may have accumulated the same; whether she had an accumulation prior to 1942; nor did he ever ask her about any independent income, — in fact he never talked to her.

The situation is far worse than in the *Bryan* case, supra, wherein the Court states at p. 226:

> "The substance of his (the agent's) statement was that it contained all the assets which he, an auditor of much experience could find."

In the *Bryan* case, a diligent effort was made to ascertain cash accumulations. In this case no such effort was made, even though the agent was put on notice of accumulations through gifts. The issue resolves itself into this simple question: Can an agent (a) ignore cash accumulations in net worth cases; (b) fail to make any investigation with respect to such accumulations after notice of alleged accumulations; (c) offer the net worth statement; (d) which statement will sustain a conviction? If such be the law, then "due process of law", as originally understood in Anglo-American Jurisprudence, is a delusion.

B—*It omits from its calculations, two calendar months or one-sixth of the defendant's business operations for the base year.*

The net worth statement for the year 1942 carries the item "Loans Receivable $27,072.43". This item shows money owed to the Defendant by the corporation $27,072.43. This figure is admittedly not a correct or remotely correct figure. The agent admitted this figure represents the account between the parties as of October 31, 1942, not as of December 31, 1942 (139). The Record does not show what the account was as of December 31, 1942. This figure was a large and important figure but an utterly inaccurate figure. The corporation was on a fiscal year from October 31 to October 31; the Defendant was on a calendar year, from December 31 to December 31 (140). As of December 31, 1942, the end of the Defendant's calendar year this figure could have been zero, or many times the amount set forth in the net worth statement. The agent obtained the books in March, 1946, and the correct figure was on the books, (139-140) but the agent saw no necessity to use the correct figure.

C—*The Net Worth Statement was made by the Agent without even asking the Defendant's Wife if she owed anybody any money, and without even accurately ascertaining what money the Defendant owed.*

The agent never questioned Mrs. Bell about money which she might owe. When asked whether he asked the Defendant if the Defendant owed any money the agent answered (104):

> "Yes, there is a question there I asked him it. I believe it is on the second page.
>
> Q. (Mr. Anderson) This is the question, isn't it: 'Don't you have any *loans due* from other persons outstanding since January 1936'? (Italics supplied.) A. The answer is no.
>
> Q. That is correct. It is not whether you owed anybody, but it is loans due from anybody; is that correct: Is that what it says: Did you have any loans due from anybody? A. That is correct."

The accuracy of the agent's report is shown by the above transposition of "owe" into "own" and "own" into "owe".

D—*The statement does not credit the Defendant with $3,708.49 paid the Defendant in 1942, and shown on the Defendant's tax return for the year 1942.*

The Defendant's tax return for 1942 shows in detail on its face, a liquidating dividend which had been paid the Defendant in 1942 in the matter of Morton H. Goldberg in the sum of $3,708.49 (133). (The actual payment was $4,635.61 of which 80% or $3,708.49 belonged to Mr. Bell and the balance to someone else.) This sum was not included by the agent in the net worth statement for 1942 (133), but instead was added to the Defendant's income in 1943. Thus income (sale of a capital asset) received in 1942, accounted for in 1942; on which tax was paid in 1942, was charged by the agent as earned income in 1943. By this bit of arithmetic the base year 1942 was reduced by the sum of $3,700, but the next year, 1943, was swollen by some $3,700. This was done even though the 1942 return shows the entire transaction.

E—*The account does not credit the Defendant in 1942 with $3,021.72 due him by Orvis Bros. & Co.*

Orvis Bros. & Co. are stockbrokers. On December 31, 1942, there was due to the Defendant for stock sold $3,021.72. The agent did not give the Defendant credit for this asset in 1942 (138-139), but as in the previous case, the base year is reduced by some $3,000, and the net year is swollen by some $3,000. The approach of the agent with respect to this matter is best set forth in the agent's own words (140):

> "(The Witness) I would like to clarify, your Honor, what Mr. Anderson asked me that I had shown as accounts receivable on the stock from Orvis Brothers.
>
> On second thought I didn't show that as accounts receivable but I probably showed some stock that he had

> sold as an asset, which would make no difference at all unless it is just a different amount that he got from what he paid for it for what he sold it for." (mirabile dictu!)

In each of the above cases it is the sale of a capital asset in the base year 1942 which is carried by the agent as earned income in the year 1943; in each of the above cases a tax is paid on this income in 1942 and in each of the above cases the tax paid income is carried into 1943 and set up as a part of alleged evaded income in 1943.

The accuracy of the base year may be summarized as follows: (a) cash accumulations of the wife in the base year 1942 were not even investigated; (b) the amount of cash accumulated by the defendant in the base year 1942 was inaccurately, if at all, investigated; (c) two calendar months of the defendant's tax year was omitted from the base year; (d) amounts due and owing the wife in the base year were never ascertained; (e) the amount due and owing by the defendant in the base year was confused; (f) amount paid the defendant in the base year, on which amounts a tax was paid, is placed in the next year's net worth. In this connection, *Brodella v. U. S.*, Advanced Sheets CCH 1950 2-USTC p. 13,280 at 13,281, affirmed the ruling of the *Bryan* case and the *Fenwick* case, stating:

> "Convictions were reversed in both the *Fenwick* (49-2 USTC, par. 9448) and *Bryan* (49-1 USTC, par. 9322) cases, because in the opinion of the Court the Government's evidence did not accurately establish the basic net worth of the taxpayer at the start of the taxable year in question. We agree with the general principle of law as stated by those cases."

It is submitted that the defendant's net worth in the base year does not even pretend to meet the standard of proof as set forth in the *Bryan* case, the *Fenwick* case, and the *Brodella* case.

The Net Worth Statement is Replete With Errors for the Tax Years 1943, 1944 and 1945

A—*The Net Worth Statement contains a double charge of $15,000 against the Defendant in 1944.*

In 1943, 1944 and 1945, the Defendant was the owner of a certain piece of real estate in Atlantic City. The agent charged the Defendant with this property at its cost price of $45,039.63 in 1943 and 1944 in the net worth statement (154). (Schedule to Exhibit 28). In 1944 the Defendant entered into a contract to sell said property receiving, as shown on the settlement sheets (Exhibits 17 and 18), the sum of $16,875. by way of deposit when the contract of sale was signed. Of this $16,875., the sum of $15,000 was a deposit given the Defendant on signing the contract. The Defendant offered on cross-examination to trace $15,000 of this $16,875. through the Defendant's bank account, and to show that this $15,000 was still in the Defendant's account on December 31, 1944. The Court erroneously refused to allow the Defendant to fully develop this (154) and the Record must speak for itself in this connection. The fact remains that $15,000 was paid by way of deposit in November, 1944, the month when the contract was signed. The net worth statement was not adjusted to show this payment on account, but it was simply added to the Defendant's cash in bank without reducing the $45,000 by the $15,000. It was a double charge of $15,000. It is perfectly apparent that a deposit on the sale of real estate is not income until the deposit is forfeited or the sale consummated. This sale was consummated in 1945 (62) but the $15,000 deposit was charged by the agent as income to the Defendant in 1944.

B—*The net worth statement fails to give the Defendant credit for 100 shares of stock owned by the Defendant worth $2,852.70.*

C—*The net worth statement carried certain stock as an asset of the Defendant after it had been sold.*

D—*The net worth statement contained the following further errors.*

1—In the years 1943, 1944 and 1945 the agent based his net worth statement as of December 31 on figures that were correct only as of October 31 of the respective years. The books of the Washington Art Galleries had several accounts showing what the corporation owed the Defendant at any given time. There was his salary account, his rental account representing rent owed by the corporation for occupancy of the building owned by the Defendant, and there was the Defendant's trading account under the name of the Mount Vernon Galleries (46; 114). These accounts would vary from week to week and from month to month. Despite this fact, and simply because the corporation was on fiscal year ending October 31, the agent for each year in question took the October 31 balance on these several accounts and charged them to the Defendant as of December 31 balances. He did not question the accuracy of these figures; he accepted their accuracy, but *copied the October 31 figures instead of the December 31 figures.* (Emphasis supplied).

2—Although the Defendant filed a separate return in 1943, 1944 and 1945, the agent made a consolidated net worth statement for the Defendant and his wife, and thus held the Defendant liable for any increase in his wife's net worth. The agent's justification for this is best explained in his own language (28):

"Q. (Mr. Ramsey) Would you tell us why the net worth statement of Benjamin Bell contained an account in the name of Josephine T. Bell being the Perpetual Building Association? A. Josephine T. Bell, Mr. Bell's wife, as stated in the interview with Mr. Bell related that all accounts, monies, shown in Mrs. Bell's name was money transferred from his bank account into her bank account, and that was why it was included, and because it was assumed he had taken money out of the bank account, and had placed it in his wife's name in another account."

In 1943 Mrs. Bell purchased in her own name the premises 9707 Old Georgetown Road for some $16,000. On cross examination, the agent was unable to show that this $16,000 had come through Mrs. Bell's bank account, hence the Defendant's alleged statement that all monies in her account were deposited by him failed to connect the property to the Defendant, but, unabashed, the agent admitted he included this property in the Defendant's net worth statement (150), because he "*assumed* that he (Bell) had given her money, or money had been advanced by him to purchase this property" (152). (Emphasis supplied).

3—The agent failed to credit Mrs. Bell with $360. in a savings account (136).

4—The agent failed to credit the Defendant with $1,200. in Government bonds (137).

5—The agent simply read a bank statement wrong. The Defendant's bank balance as of December 31, 1945 was $1,303.59, but the agent read it $2,482.14 and thus through admitted carelessness, erroneously charged the Defendant with evading $1,179. in taxes in 1945 (55-56).

If a statement containing the above errors was submitted to a bank, a commercial institution, a government agency,

or was offered in evidence in a civil case, it would be summarily rejected. While valueless to borrow a few dollars, it is not valueless to jail citizens.

The Net Worth Statement Shows on Its Face That It Is False

In this instance the net worth statement proves its own falsehood. The Government charges the Defendant with net income in 1943 of $69,836; in 1944 with $41,115; and in 1945 with $25,203. The net worth statement shows an inventory of $8,650. To earn net income, that is, a net profit of $69,836 in one year on the sale of goods with an $8,650. inventory is too ridiculous to need comment.

The Defendant's trading account (Mt. Vernon Galleries) shows sales in the approximate amount of $20,000 in 1943. On such sales a net profit of $69,000 is also too ridiculous to need comment.

The situation is exactly the same as in the case of *Ameed Jacob and Anna Jacob, Petitioners v. Commissioner of Internal Revenue, Respondent,* in the Tax Court of the United States, Docket #19630, decided May 23, 1950. In this case an Agent of the Bureau of Internal Revenue rejected the Defendant's books because the petitioner "did not keep adding machine tapes and no records to sustain the gross receipts". The agent computed the taxpayer's income by the net worth method. The Court in considering this entire matter at pp. 8 and 9 said:

> "Respondent has rejected these records on the ground that no cash register tape or other records were kept to show that these records of cash receipts were correct. * * * Respondent, rejecting the correctness of petitioner's income and deductions, has used the 'increase in net worth method' with the result given in our findings of fact. It is manifest that respondent's method cannot be accepted as correct in view of all the evidence which

> we have in the record. For example, by the use of the 'increase in net worth method' respondent has arrived at a figure of $7,650.55 net income for 1942, $7,068.05 net income for 1943 and $19,499.25 net income for 1944. Manifestly the later figure of $19,499.25 net income is beyond all reasonable probability. Petitioners were conducting a small retail liquor and restaurant business in the City of Cleveland with only three people, including petitioners, employed therein and it does not seem that by any stretch of the imagination they could have had any such income in 1944 as respondent has determined."

The above case was a civil case, where the burden of proof was on the taxpayer. The above reasoning would seem to conclude the present case where the burden is on the Government to prove guilt beyond a reasonable doubt.

See also:

In re: Scheiman, 14 F. (2) 322.

The Government admits that the inventory figure of $8,650. is correct. The Government does not attack the gross sales shown in the Mt. Vernon account; the Government never by intimation or otherwise suggests that the Defendant had any other business, or business income, except that shown on his records; the Government makes no attempt to ascertain gross purchases during this period, or show that gross purchases are far in excess of gross sales reported, either by the Galleries, or by the Defendant; the Government blandly takes the position that because the books do not correspond with its inaccurate net worth statement, the books must be wrong. This is not an inference on an inference—this is just an assumption of guilt. The Government refuses to give credence to (a) the Defendant's statements or (b) that the increase in net worth may represent past accumulated income or non-taxable

income. The agent cannot assume figures which suit the agent's fancy and place the burden of disproving this assumption on the Defendant, as stated in *U. S. v. Berman*, 75 F. (S) 789 at 790:

> "The Government took the position that all items on these accounts were properly charged to income where defendant could not give a satisfactory explanation. In other words, placing the burden upon the defendant of proving that they were not income although in a criminal case the Government is required to prove beyond a reasonable doubt that they constituted taxable income and that the failure to return same was wilful."

Mr. Meyer Rothwacks, Assistant Chief, Criminal Section of the Tax Division, Department of Justice, scarcely a critic of the Government or a friend of the Defendant, in the *New York Institute of Federal Taxation, 8th Annual Institute*, in an article headed "Criminal Tax Prosecutions" at p. 261 stated:

> "The increase, if any, in net worth is presumed to be net income, if certain conditions obtain. These conditions apply equally to an expenditure case. They are: (1) that there is evidence of a possible source or sources of income to account for the expenditure or the increases in net worth; and (2) evidence of a 'starting point', that is, a date contemporaneous with the beginning of the first prosecution year or prior to it, at which time the taxpayer's financial condition can be established with some definiteness, this to exclude the hypothesis that the expenditures or net worth increases can be explained in terms of prior accumulated assets or funds.
>
> A substantial amount of case law has already been developed in the net worth-expenditure field. Most of the decisions are recent. They all emphasize the requirements concerning a source of income and satisfactory exclusory evidence."

The Government case fails to meet the above requirements; it is not only predicated upon inference on inference; but the net worth statement itself proves its own falsity by its own figures.

The Government Did Not Offer a Scintilla of Evidence Showing Any Unreported Income

The Defendant's sources of income fall into two general divisions—These divisions are: (a) Galleries income; (b) non-Galleries income being rents, some dividends and a few capital gains.

In accounting for the above sources of income, the Government admits the following:

(a) Rentals—The corporate books had a rental account showing rent due the defendant by the corporation, covering its place of business, 722 Thirteenth Street (114). The Defendant had a personal bank book showing other rentals collected by the Defendant (116). The agent found no rentals other than those reported. The Government does not allege that rentals were collected by the Defendant which do not show on the Defendant's books and records.

(b) Some few dividends—income from dividends was negligible. The Government makes no claim of unaccounted for dividends.

(c) Long Term Capital Gains—Settlement sheets disclose all real estate transactions although settlement sheets were not requested by the Agent (117). The tax returns themselves disclosed all long term capital gains (125). The Government makes no claim that long term capital gains were not reported.

In the light of the above, it follows that the Government's sole complaint is directed at the corporate books. This complaint is:

Because the net worth statement differs with the corporate books, the corporate books, and not the net worth statement, must be wrong. To sustain this self-serving inference, the Government does not allege that the books do not accurately show the transactions set forth in the books, but categorically assumes that there must be transactions not set forth in the books. There is not one single scintilla of direct proof of this categorical assumption. Not a single witness was produced to show unreported sales, unaccounted for inventories, unexplained purchases, unlisted sales, failure to properly list all daily sales in Daily Cash Book, or any other proof that the books were false.

The Corporate Books

The corporate books showing the Defendant's Gallery income consist of the following:

(a) A journal showing cash receipts and disbursements listing all checks, showing allocation of amounts of sales, various expenses and closing and journal entries (10). This also contains a ledger for exchange or accommodations items. (Volumes 2, 13-14).

(b) A ledger showing expenses, mixed accounts, from which profit and loss statements are prepared (10), ledger sheets showing the individual accounts of individual customers (10).

(c) A daily cash book showing date of sale, amount of sale, and to whom sold (10). The daily cash book shows the name of purchaser, opposite which is the

amount of the purchase. The daily totals are entered in the journal and in turn can be checked against bank deposits (122). (Volume 2, 15-22).

Periodically, at the end of each fiscal year from the cash books, checks and other data, entries were made in the ledger and journal (13). The ledger index would list the corporate purchases indicating the ledger sheets showing customers' accounts (15). In addition, the ledger also shows the Defendant's rental account, loan account, personal account and storage account (16). The Rental account shows rents due the Defendant by the corporation (16), the Personal Account shows salaries paid to the Defendant and the money paid for his account (17), the Commission account shows commisions due the Defendant on account of sales (17), and the Loan account showed any loans due and owing between the corporation and the Defendant (17).

The agent admitted he could find no inaccuracies in the books, but assumed that he could not ascertain the Defendant's income from the books because there were no invoices or cash register tape to substantiate the books, and, because the corporation was on a fiscal year basis as distinct from a calendar year basis (19).

This claim by the agent is ridiculous since (a) the cash book contains more information than a cash register tape, (b) a fiscal year closing or a calendar year closing has nothing to do with the accuracy of the books, and (c) the individual cash sales were traced daily into the ledger and from the ledger could be checked against bank balances. The books in this case were obviously more detailed than those in the *Fenwick* and *Bryan* cases, supra.

The only way the books could be inaccurate was to have each clerk, who worked in the Defendant's store, be in an active conspiracy with the Defendant so that each clerk would deliberately refuse to register the name, date, and amount of sale in the daily cash book. There is not a scintilla of evidence to this effect.

Not only would all the clerks be required to be in this conspiracy, but the Defendant's auditor would be required to be in the conspiracy. For an auditor to assemble all the data as shown by the books without finding discrepancies, when the alleged discrepancies in one year are $60,000., would have been literally impossible. There is not a scintilla of evidence to this effect. Had the books in fact been false, many witnesses would have been available to the Government to show the books were false, e. g., clerks, the Defendant's auditor, purchasers, consignors, sellers and many people whose names are disclosed in the books themselves. Not a scintilla of such evidence was produced.

The sales entered in the daily cash book (Exhibit 7) could be checked against the journal, and journal totals checked against deposits in the bank. It is assumed that such a check was made by the agent, and it is assumed that the cash book was found to be accurate, or there would be evidence to the contrary.

It is not within the province of the agent to refuse to accept the taxpayer's books when he can find no inaccuracies in the books, and no other sources of income of the taxpayer, and thereby shift the burden of proof to the taxpayer to prove the accuracy of books in which the agent himself could find no inaccuracies.

In re: *Scheiman*, 14 F. (2) 323 at 325;
U. S. v. Berman, 75 F. (S) 789;
Jacob v. Com. of Internal Rev., Tax Court Docket 19630.

There is no requirement that an individual taxpayer keep formal books. It is only required that where a taxpayer's gross income does not consist *solely* of wages or salary, that he keep such permanent books of account or records as are sufficient to establish his gross income, see *Reg. III, Sec. 29.54-1 CCH par. 480.* While the Defendant did not keep formal books of his income other than for the corporation, he did keep bank deposit books, written memoranda, check stubs and checks, brokers statements and title settlement sheets, all of which are permanent records sufficient to establish his gross income.

Discussion — Invoices

The United States Court of Appeals for the Fourth Circuit belabors the fact that there were only fifty or sixty invoices furnished the agent. This raises the question — What is an invoice?

Webster New International Dictionary, Second Edition, Unabridged, defines an invoice in its commercial sense as "(1) a written account or itemized statement of merchandise shipped or sent to a purchaser, consignee, factor, etc., with a quantity, value or prices and charges annexed. (2) The lot or set of goods as shipped or received; as, the merchant receives a large invoice of goods."

It is common business knowledge that an invoice is only applicable where goods are shipped or sent by a seller or consignor and on which charges are due. An invoice is a commercial document applicable to a "shipment" or "consignment", not to a "sale". As stated by the Court in *Greis v. Fidelity and Casualty Co. of New York,* 19 F. Supp. 480 at 481:

> "An invoice 'is merely another term for bill rendered,' 'a list of goods sold and the prices charged for

them'; it 'is neither a bill of sale, nor evidence of a sale, and, standing alone, furnishes no proof of title'. 4 *Words and Phrases, First Series,* p. 3761; 33 *C. J.* 811."

In *Dows, et al. v. National Exchange Bank of Milwaukee,* 91 U. S. 618, 630, 23 L. Ed. 214 at 218, the Court said:

> "An invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, and cost or price of the thing invoiced, and it is as appropriate to a bailment as it is to a sale."

Nowhere is there any evidence that the corporation or defendant shipped or received goods under conditions where an invoice would normally be used and where none was available. An invoice, by its nature, is not needed to substantiate a sale, nor does the law consider that an invoice does substantiate a sale.

In concluding this phase of the case, it is submitted that not only is this *Bell* case in direct conflict with the *Fenwick* case, and the *Bryan* case, but the net worth statement which was offered in evidence in this *Bell* case is utterly inaccurate and fails to establish either the base year or any other year accurately, and with competent evidence.

III.

THIS CASE CALLS FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION BECAUSE THE RULINGS OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN SANCTIONING CERTAIN RULINGS OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AT BALTIMORE HAS DEPARTED FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEDURE.

The departure from the usual and accepted course of judicial procedure were the Rulings of the Lower Court in refusing to allow the Defendant to cross examine the Special Agent with reference to matters that were relevant to the case, and within the scope of direct examination.

(a) *By refusing to allow the Defendant to cross examine the Special Agent in order to ascertain what the Agent found in the Defendant's safe deposit box* (108-109).

The Agent insisted upon entering the Defendant's safe deposit box immediately after the first interview with the Defendant on March 28, 1946. The Agent obviously expected to find cash; had the agent found cash, the Court, as in past cases, would have admitted this in evidence.

The Agent made an inventory of the contents of the box. The Defendant has a right to bring out before the jury the contents of this inventory. The Defendant had the right to cross examine the agent as to whether this inventory contained information which would assist an accountant in determining the Defendant's income. The Agent was allowed to assert the Defendant's books and records were inadequate, while the Defendant could not ascertain all of the books and records which were examined by the Agent.

The Agent's examination of the safe deposit box, and the inventory of the contents of the box was a part of his investigation, and was included in the Agent's direct examination. In *Reilly v. Pinkus,* L. Ed. Advanced Sheets, Vol. 94, p. 82, this Court held that even in an administrative proceeding where great latitude is allowed the presiding officer, it was error to limit unnecessarily or arbitrarily the right to cross examine, stating at p. 84:

> "But in this kind of case as in others, one against whom serious charges of fraud are made must be given a reasonable opportunity to cross examine witnesses on the vital issue of his purpose to deceive."

A full cross examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere

privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error.

Alford v. United States, 282 U. S. 687, 75 L. Ed. 624;
Lindsay v. United States, 133 F. (2) 368;
Heard v. U. S., 255 F. 829;
Cossack v. U. S., 63 F. (2) 511;
Arnold v. U. S., 94 F. (2) 499, 506;
Underhill's Criminal Evidence (4th Edition), Sec. 400.

(b) *By refusing to allow the defendant to cross examine the Special Agent in order to ascertain what the defendant's bank book, check stubs and deposit books showed relative to the Defendant's income and related matters* (114-115).

The Government charges that the Defendant maintained inadequate books and records. Cancelled checks, check stubs, and personal bank books are records of income and hence go to show the adequacy of the defendant's books and records. The net worth statement itself contains two items headed "Living expenses paid by check" and "Miscellaneous expenses paid by check" (Vol. 2, Exhibit 28). The agent was allowed to testify with respect to these matters predicating his testimony on checks of the Defendant. The Defendant was not allowed to go into the question of checks, check stubs and personal bank books. The cross examination was directly within the scope of the direct examination and went to a vital issue in the case, and therefore should have been admitted in the evidence.

(c) *By refusing to allow the Defendant to cross examine the Special Agent about his failure to answer a letter directed by special delivery to the agent by the attorney for the Defendant in which letter were statements in direct conflict with the agent's testimony on the stand* (127-132).

The agent requested the Defendant to sign a certain statement purporting to contain the questions and answers taken at a conference between the Agent and Defendant on October 11, 1946. The Defendant refused to sign the same claiming the statement contained inaccuracies. The Defendant called his attorney, Mr. Hart, who advised the Defendant not to sign the statement because of its inaccuracies. This was on Thursday, November 21, 1946 (129). The Defendant's attorney arranged to meet with the Agent, the Defendant, and a court stenographer on the following Monday, November 25, 1946. On the preceding Saturday, the Agent called the Defendant and broke the engagement (130). The Defendant's attorney learned of this on Monday, November 25, and immediately wrote the Agent by registered mail with respect to this matter which letter was received by the Agent, but the Agent made no reply. The Agent from time to time referred to the alleged inaccurate statement, and gave his understanding of what was to be done at the subsequent conference. The Defendant was not allowed to check this evidence against statements made in the letter, to which no reply was made. A failure to deny is ordinarily an admission that the facts asserted are true. In this case there was a complete failure to deny, hence, at least, the Defendant should have been allowed to question the Agent with respect to whatever allegations were contained in the letter.

It is a general rule that where two parties have carried on correspondence in reference to a particular matter, and the one writes the other making statements relative to the subject matter of the correspondence, which statements the recipient would naturally deny if not true, then if the recipient fails to answer, his omission is evidence to show that the statements in the letter are true. 20 *Am. Jur.* page 481, Evidence, Sec. 568.

In *Wigmore on Evidence* (1st Edition), Section 1073, it is said:

> "The written statements of a third person may be so dealt with by the party that his assent to the correctness of the statements may be inferred, and thus they would by adoption become his own statements.
>
> What sort of dealing with the document will suffice for this purpose has in several respects been a mooted question. * * * the different situations may be grouped under four heads:
>
> (1) Documents seen;
>
> * * * * * *
>
> (4) Documents made use of.
>
> (1) In some circumstances, the party's mere sight or perusal of a third person's document, without responsive protest of denial or explanation, may indicate an admission of correctness."

While the foregoing is said with regard to a "party" *Wigmore* at Section 1042 in dealing with silence as constituting the impeaching statement for a witness indicates the principles involved are the same whether a witness or a party is concerned.

In 31 *C. J. Secundum*, page 1065, *Evidence*, Section 297b, it is said:

> "The test of admissibility of letters as admissions is found in whether circumstances are such that in ordinary practice the party receiving the letter would have answered it if he did not acquiesce in the statements contained therein."

In the instant case, and with the background of the situation, if the agent did not agree with the statements contained in Mr. Hart's letter of November 25, 1946, he would

have immediately answered the letter, stating that Mr. Hart did not correctly represent the situation.

There is the background of a conference on November 21 at which a serious disagreement arose between the agent representing the Government, the Defendant and his counsel. There is an appointment made for November 25 for a specific purpose. This appointment is broken by the Agent. Mr. Hart, who is one of the parties to the conference of November 21, immediately wrote to the Agent. The letter was sent by Mr. Hart by registered mail, return receipt requested. Surely this puts the Agent on notice that the letter, and the contents thereof, were considered of the utmost importance by the taxpayer and his counsel, and should have invited a reply. This put the Agent on notice that the Defendant's counsel was trying to establish in the only way open to him, a record of the actual disagreements between the parties at the meeting on November 21, and was a studied and stated effort to bind both parties as to exactly what occurred at that meeting. The Agent's silence constitutes the adoption by him of the statements in the letter.

In order to attack the credibility of a witness, it is proper to cross examine him as to statements or admissions made out of court which are inconsistent with his testimony at the trial.

Jones on Evidence (4th Edition) Section 826;
Wharton's Criminal Evidence (10th Edition) Section 482;
70 C. J. 1075, Witnesses, Section 1273;
Cossack v. United States, 63 F. (2) 511;
Heard v. United States, 255 F. 829, 832;
United States v. Phelan, 252 F. 891, 892;
58 *Am. Jur.*, pages 369-370, Section 676, pages 423-425; Section 773, page 423.

The above ruling was not only in error but highly prejudicial error.

(Note)—The Court refused to permit defendant to even mark Mr. Hart's letter for identification (130), hence it could not be included in the record on appeal. Counsel brings this letter before the court in the only way open to them by attaching a copy of it to the brief as Exhibit A).

(d) *By refusing to allow the defendant to show that he paid income tax on income received in 1942 on which income the Government in its net worth statement charged the defendant in 1943* (137). The indictment specifically charged the Defendant with the failure to pay a certain amount of tax which the indictment alleged was due and owing the Government. While it is true that the Government is not required to show the exact amount of tax due and owing by the Defendant, any question going to that issue is relevant in the case. The Defendant certainly has the right to attack the statement of tax as set up in the indictment and the net worth statement, and this was a direct attack on both.

(e) *By refusing to Allow the Defendant on cross examination to find out what schedules, made up by what person other than the Agent, were used by the Agent to make the Net Worth Statement* (144). It is an elementary principle of law that testimony is not admissible unless the person giving the evidence can testify from his own knowledge, and if it later appears that the testimony is not based on his own knowledge, it must be stricken. *Wigmore on Evidence*, (1st Edition), Vol. I, Sec. 656 and 657. The uncontradicted evidence shows that one McDermott made up certain schedules (139), and one Cunningham, an agent, made up certain schedules (96). It obviously became important to ascertain if any other

schedules were made up by other persons, and what these schedules were. This question went to the very heart of the authenticity of the net worth statement. If such cross examination is not permitted then net worth statements may be indiscriminately placed in evidence, irrespective of how prepared.

(f) *By refusing to allow the Defendant to show that the deposit of $39,850.00 was most unusual and by far the largest deposit to be found in cash receipts from 1943 through 1945* (147). The cases make the point that regular deposits of a nature consistent with business income, and unaccounted for, tend to prove evasion. Many of the cases are predicated upon a regularity of deposits consistent with a business income which income was not reported, but all the cases hold that an unusual, single large deposit does not prove earned income.

Gleckman v. U. S., 80 F. (2) 394 at 399;
Malone v. U. S., 94 F. (2) 281 at 287;
Barcott v. U. S., 169 F. (2) 929 at 931.

It was therefore proper cross examination and most important for the Defendant to show that this deposit was a most unusual deposit, the largest deposit ever made in the account. By this ruling the Court not only violated the well recognized principle that the full cross examination of a witness upon the subjects of his examination in chief is the absolute right of the party against whom he is called, but the Court greatly prejudiced the Defendant's case.

(g) *By refusing to allow the Defendant to cross-examine the Agent about three checks, which show on their face that they were deposited in the Defendant's bank account, and which checks constitute an item of $15,000 for which the Agent charged the Defendant twice in 1944.* One phase of this question has been previously discussed at page 33 of this brief wherein inaccuracies of the net worth statement

were discussed. It is necessary to further discuss this matter here, in connection with the Court rulings on evidence, since the Court refused to allow the Defendant to cross-examine the Agent with respect to this matter.

In considering this ruling, it must be remembered that certain factors in this case are admitted. These factors are: (a) a deposit of three checks in the amount of $5,000 each in the Defendant's bank account for the year 1944 adds $15,000 to the Defendant's net worth; (b) by adding this $15,000 to the Defendant's net worth in 1944, the Government increases the Defendant's net income in 1944 by $15,000; (c) this alleged increase in earned income goes to the heart of the case—the Defendant *denies* this is income; the Government asserts it *is* income.

If the Defendant cannot attack this alleged increase, then the Defendant cannot defend himself. It is the Defendant's position that this $15,000 item was not an increase in net worth, but was a double charge against the Defendant, in that, (a) the Defendant was charged with it in his real estate and (b) charged with it a second time when it was deposited in his bank account after he received this $15,000 upon signing a contract to sell the real estate.

For the Court to rule this cross examination inadmissible because the agent didn't recognize the checks is to: allow the agent to quarantine himself against cross examination about checks which show on their face that they are payable to the Defendant and deposited in his bank account.

The agent testified that all the Defendant's checks went into the net worth statement; the Court ruled the agent could not be cross examined about three of these checks; the Court ruled the agent could not be cross examined about "Cash" which is an item of the net worth statement. It is submitted that this ruling alone was reversible error.

CONCLUSION

Counsel for Petitioner well recognize that the number of cases which this Honorable Court can hear and consider are limited, and that many broad social questions, questions involving civil liberties, questions involving racial, religious and political minorities are presented to this Court which claim its consideration and which are almost insatisable in their demands on the time of this Court.

With all due humility and with the utmost respect, counsel urge upon this Honorable Court the view that when a citizen is unjustly jailed and deprived of his liberty, an injustice has been done which merits the consideration of this Court. In Matthew, 10, verses 29 to 31, it is said:

> "Are not two sparrows sold for a farthing, and one of them shall not fall on the ground without your Father."
>
> "But the very hairs of your head are numbered."
>
> "Fear ye not therefore, ye are of more value than many sparrows."

We pray, therefore, that this Court take notice of the injustice done to one who is of more value than many sparrows and that the petition prayed herein be granted.

Respectfully submitted,

G. C. A. ANDERSON,

GEORGE L. HART,

ANDERSON AND BARNES,

Attorneys for Petitioner,
Maryland Trust Building,
Calvert and Redwood Streets,
Baltimore, Maryland.

EXHIBIT A

(Letter from Mr. Hart to Special Agent)

Sent Special Delivery

Registered Mail, Return Receipt Requested
Mailed at Main Post Office, 13th and Pa. Ave., by Bell at 1.45 P. M.

November 25, 1946.

Bureau of Internal Revenue
Intelligence Division
310 Sixth Street, N. W.
Washington, D. C.

Attention: Charles Knight

Dear Mr. Knight:

In view of the fact that you called Mr. Bell on Saturday afternoon, November 23, 1946 and canceled the appointment which you had made with Mr. Bell and me for ten o'clock this morning, I wish to confirm our conversation at 722 Thirteenth Street on November 21, 1946 in the presence of Mr. Benjamin S. Bell and Mr. Cunningham relating to the statement prepared by your office for Mr. Bell's signature. I should also like to make clear our position about this statement to insure against any misunderstanding.

Mr. Bell, upon reading the statement you presented to him, which you said had been prepared from the notes taken by your stenographer at a meeting in your office on October 11, 1946, noted a number of inaccuracies and omissions in it and called these to your attention. There were also inaccuracies in the questions propounded, which you conceded. Naturally under these circumstances, I could not permit Mr. Bell to sign the statement unless corrections were made. We were willing to make the necessary corrections on the paper presented and initial the same but this was not agreeable to you. You insisted that you wanted Mr. Bell to sign the statement just as it was. After some discussion, you suggested that Mr. Bell and I meet you at your office at ten o'clock on Monday

morning and you would have the stenographer read back her notes and check them with the statement. We agreed to this and I asked you if we might have a court reporter present to report the conference, and you expressed yourself as agreeable to this.

Before you left Mr. Bell's place I asked you if we might have a copy of the statement which you had prepared in order that we might compare it with the notes made by Mr. Emil Smith at the conference on October 11, 1946, he being present at the time as Mr. Bell's accountant. You replied that we could not have a copy of the statement unless Mr. Bell first signed it.

I want to make clear that I have no objection to Mr. Bell signing and he has no objection to signing a statement which accurately represents the questions put by you to Mr. Bell on October 11, 1946 and his responses thereto.

Very truly yours,

GEORGE L. HART, JR.

GLH:jmw

Form 3806-S.

177849

Postmaster per Rogers

Receipt for Registered Article No. 177849

POSTMARK

Fee paid 20 cents. Class postage 1.

Washington, D. C.

Declared value No Surcharge paid, $....

Nov. 25, 1946

Return Receipt fee 4 Spl. Del'y fee 13.

Benjamin Franklin Sta.

Delivery restricted to addressee:

in person ....., or order ..... Fee paid .....

Accepting employee will place his initials in space indicating restricted delivery.

c7—16—19433—2 GPO

The sender should write the name of the addressee on back hereof as an identification. Preserve and submit this receipt in case of inquiry or application for indemnity.

Registry Fees and Indemnity.—Domestic registry fees range from 20 cents for indemnity not exceeding $5 up to $1.35 for indemnity not exceeding $1,000. The fee on domestic registered matter without intrinsic value and for which indemnity is not paid is 20 cents. Consult postmaster as to the specific domestic registry fees and surcharges and as to the registry fees chargeable on registered parcel-post packages for foreign countries. Fees on domestic registered C. O. D. mail range from 25 cents to $1.20. Indemnity claims must be filed within 1 year (C. O. D. 6 months) from date of mailing.

Form 3811
Rev. 1—4—4x

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1—Charles H. Knight
(Signature or name of addressee)

2—Edw. McIntyre

(Signature of addressee's agent—Agent should enter addressee's name on line ONE above)

Date of delivery ....., 194..

U. S. Government Printing Office 16-12421

Post Office Department
Official Business

Penalty for Private Use to Avoid Payment of Postage, $300

Washington 13, D. C.
Nov. 26, 1946, 3 P. M.

Mail Early for Christmas

Postmark of Delivering Office

Return to Lambert, Hart & Northrop

(Name of Sender)

Street and Number, or Post Office Box—218 Munsey Building.

Registered Article

No. 177849

Washington 4, D. C.

Insured Parcel

No.....

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 444

BENJAMIN BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 258-270) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1950. (R. 270.) The petition for a writ of certiorari was filed on December 8, 1950. The jurisdiction of the Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether proof of increases in net worth was legally sufficient, under the circumstances of this case, to sustain a conviction for wilfully attempted tax evasion.

2. Whether the trial court erred in restricting petitioner's cross examination.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(26 U.S.C. 1946 ed., Sec. 145)

STATEMENT

Petitioner was indicted in three counts under Section 145(b) of the Internal Revenue Code for attempting to defeat and evade a large part of the

income and victory tax owing by him to the United States for the years 1943, 1944 and 1945 by filing false and fraudulent returns for each year, in which he knowingly understated his net income and the amount of the tax. It was charged that for the year 1943 he reported a net income of $11,135.39 and a tax of $2,912.28 although his income was $69,836.83 and his tax $41,125.84; for the year 1944 he reported a net income of $13,887.71 and a tax of $3,378.96 although his income was $41,115.81 and his tax $18,771.73; and for the year 1945 he reported a net income of $18,667.14 and a tax of $5,593.57 although his income was $25,203.85 and his tax $8,940.28. (R. 258.)

He was tried and convicted by a jury in the District Court and sentenced to a fine of $10,000 and imprisonment for six months on the first count; $5,000 and six months imprisonment on the second count; and $2,500 and six months imprisonment on the third count, the sentences of imprisonment to run concurrently and the fines to be cumulative. (R. 258.)

The petitioner offered no witnesses on his behalf, although he employed accountants who kept the books of the corporation and an auditor who conferred with the revenue agents. (R. 259.)

Petitioner was an auctioneer. He had carried on that business since 1933 at 722 13th Street, N. W., Washington, D. C., through a corporation called Washington Art Galleries and Auction Rooms, of

which he was the virtual owner. He was also the sole owner in his personal capacity of an auction business for used furniture, which was carried on in Alexandria, Virginia, under the name of Mt. Vernon Galleries. The business at this location was closed and removed to the 13th Street store of the corporation in Washington in November, 1942. During the years 1943 to 1945 under investigation, petitioner continued to use the name of the Mt. Vernon Galleries to denominate his personal business in his personal income tax return and reported the net income therefrom in addition to the salary and dividends which he drew from the corporation. (R. 259.)

Petitioner kept no books of account or records of the income of his individual business except his bank deposit book, in which some descriptive entries were made; his personal check book; and certain cancelled checks. (R. 259-260.) The corporation kept books which included a cash book, a journal and a ledger; and the ledger contained separate accounts which purported to show transactions between the corporation and petitioner, and between the corporation and the Mt. Vernon Galleries respectively. There were, however, no records, except in a minority of instances, to support the entries on the books of the corporation. There were only fifty or sixty invoices during the period 1943 to 1945 covering the consignment of goods for sale and the commissions paid thereon, which varied in amount from time to time;

and except for certain cancelled checks there were no other documents or cash register tapes to support the entries in the books. Moreover, the entries in the books, except those in the cash book, were not made daily; but the entries in the journal and ledger were made some time during the year from the cash book, check books and other data. (R. 260.) The entries in the cash book showed only ~~disbursements~~ receipts and were quite informal and devoid of explanation. Typical of the entries is the following (R. 260):

January 2, 1943	Johnson	$ 50.00
	Elizata	125.00
	Kent	652.30
	Guest	12.50
		$839.80

An investigation of the income tax liabilities of the petitioner during the years in question was instituted in March, 1946, by Charles H. Knight, a special internal revenue agent, who interviewed the petitioner and learned from him some things in respect to the nature of his business and his investments. His business records were made available to the agent. Knight had been connected with the Bureau of Internal Revenue in the statistical section of the Corporation Tax Division since 1938, had secured a degree in accountancy and had been working on books and accounts in income tax matters since 1940. He concluded from

his investigation that the corporate books and other data submitted to him by petitioner did not reveal the taxable income of petitioner because the corporate books were kept on a fiscal year basis whereas petitioner's income was reported on a calendar year basis, and especially because of the deficiencies of the corporate records in support of the entries on the corporate books above described. (R. 260-261.)

These inadequacies led the agent to prepare a net worth statement to ascertain petitioner's true income for the years in question. The petitioner not only conducted an auction business but also dealt in securities and in real estate. Accordingly, the agent made an extended examination of real estate records, bank records, stockbrokers' records, Treasury Department records, insurance company records, mortgage and lending institution records, in order to ascertain the petitioner's assets and liabilities. From this data he prepared a net worth statement showing the total assets of the petitioner, including cash in bank, United States bonds, stock, real estate, loans receivable, life insurance and other investments amounting to a total of $129,-991.17, and liabilities consisting of mortgages on real estate and reserve for depreciation in the aggregate sum of $47,722.20, or a net worth on December 31, 1942, of $82,218.97. (R. 261.) The item of cash in banks included monies in the name of petitioner's wife and children, since petitioner

had stated that they had no independent source of income. (R. 261.) The agent did not find and there was no intimation that petitioner owned any other assets. (R. 48.)

A copy of the net worth statement was made available to petitioner's accountant. (R. 24.) Petitioner had access to his accountant's net worth account papers and work sheets. (R. 49, 147.) Petitioner made no claim at the time that he possessed other assets than those shown on the statement and he offered no evidence at the trial to contradict this statement of his net worth at the beginning of the period under examination. (R. 261.)

By resort to similar records, the agent found petitioner's net worth at the end of 1943, 1944 and 1945 to be $141,208.48, $175,950.06 and $201,482.78, respectively; and by subtracting the net worth of the preceding year, the increases in net worth during the taxable years were found to be $58,989.51, $34,741.58 and $25,532.72, respectively. (R. 261.)

In order to find the taxable income for these years, the disbursements of petitioner for living expenses, taxes, insurance premiums and miscellaneous expenses were added and the allowable deductions from income and the non-taxable long term gains were subtracted so that the taxable net income for the years in question was found to be $69,836.83, $40,615.81 and $24,703.85, respectively. (R. 261.)

The agent testified that petitioner admitted that

he had not received any gifts or inheritances but that everything he touched "seemed to turn to gold" during the years in question (R. 48); that his wife was a housewife and the monies used by her were furnished to her by him (R. 28); and that on inquiry about cash on hand in 1942, 1943, 1944 and 1945 petitioner stated orally he would get small amounts which were not sufficient for making deposits (R. 101-103). Petitioner contended during an interview with the examining agent on October 11, 1946, some six months after the investigation started, that he had other available assets in the form of alleged gifts from his mother to his wife and his children. (R. 48-51.) He told the agent that on each of his wedding anniversaries his mother would give his wife a four thousand dollar anniversary present and on each of the three children's birthdays she would give a like amount. (R. 49.) This money was said to have been kept in a small safe on the top floor of petitioner's business premises. (R. 78.) Petitioner told the agents he did not know where his mother kept her money. (R. 78.) During each of the years covered by the indictment, petitioner claimed his children and his mother as dependents. (R. 7-8.) Petitioner's 1943 return gave as his reason for claiming his mother as a dependent that she was "incapable of self-support". (R. 49.)

The statement prepared by the agent showed that the greatest increase in net worth during the

period under examination was in real estate. At the end of 1942 petitioner owned real estate in the sum of $77,546.57. This item was increased to $138,761.20 at the end of 1943, $147,887.24 at the end of 1944, and $219,220.91 at the end of 1945. The testimony as to the source of the funds with which petitioner increased his real estate holdings may be summarized as follows. In 1943 petitioner purchased real estate in Atlantic City for the sum of $45,038.76 and paid for it with two checks on his personal bank account in the aggregate sum of $5,188.76 and one check for $39,850 on the bank account of his corporation which sum petitioner had deposited to the corporation's credit. When asked as to the source of this money petitioner told the agent that he had gotten it in the form of a loan from his mother who paid it to him in cash. No check or promissory note or other record evidence of the loan was shown to the agent or produced at the trial. Petitioner told the agents that no interest on the loan had been paid and he continued to list his mother as a dependent in his tax returns for 1944 and 1945. (R. 262.)

In 1943, the property No. 9707 Georgetown Road in Washington was purchased in the name of petitioner's wife for $16,175.87 with funds taken from her account, and the title was taken in her name. The money, however, was deposited in her account by petitioner. She was listed in his tax returns as a dependent and filed no tax returns

herself. In 1944, the adjoining property was acquired under similar circumstances for $9,126.04 and placed in the name of petitioner's wife. (R. 262-263.)

In 1945, petitioner sold the Atlantic City property for $75,000 and bought a building at 1808 Adams Mill Road in Washington for $100,622.43, paying the difference from his personal and corporate bank accounts. In 1945 he purchased a one-third interest in the property at No. 7101 Georgetown Road for the sum of $15,750. The net worth statements show no reduction of the other assets or increase of liabilities sufficient to cover the increase in petitioner's real estate. (R. 263.)

ARGUMENT

1. Petitioner's corrected net income was proved by showing increases in his net worth during each of the indictment years, along with evidence tending to show (1) a source of the unreported net income and (2) the improbability that the increases in net worth reflected anything other than current income. Indirect proof of corrected net income is fully warranted in criminal tax prosecutions where, as here, the records maintained by the taxpayer do not clearly reflect income. Internal Revenue Code, Sec. 41 (26 U.S.C. 1946 ed., Sec. 41). This Court (*United States* v. *Johnson,* 319 U. S. 503, 517, rehearing denied, 320 U. S. 808) and the various Courts of Appeals have sanctioned

proof of net income by bank deposits or expenditures or net worth increases or by a combination of these three types of circumstantial evidence. *Gleckman* v. *United States,* 80 F. 2d 394 (C.A. 8th), certiorari denied, 297 U. S. 709; *United States* v. *Skidmore,* 123 F. 2d 604 (C.A. 7th), certiorari denied, 315 U. S. 800; *United States* v. *Chapman,* 168 F. 2d 997 (C.A. 7th), certiorari denied, 335 U. S. 853; *Barcott* v. *United States,* 169 F. 2d 929 (C.A. 9th); *United States* v. *Potson,* 171 F. 2d 495 (C.A. 7th); *Stinnett* v. *United States,* 173 F. 2d 129 (C.A. 4th), certiorari denied, 337 U. S. 957; *Schuermann* v. *United States,* 174 F. 2d 397 (C.A. 8th), certiorari denied, 338 U. S. 831, rehearing denied, 338 U. S. 881; *Kirsch* v. *United States,* 174 F. 2d 595 (C.A. 8th); *Bryan* v. *United States,* 175 F. 2d 223 (C.A. 5th), affirmed, 338 U. S. 552; *United States* v. *Fenwick,* 177 F. 2d 488 (C.A. 7th); *Lurding* v. *United States,* 179 F. 2d 419 (C.A. 6th); *Jelaza* v. *United States,* 179 F. 2d 202 (C.A. 4th); *Buttermore* v. *United States,* 180 F. 2d 853 (C.A. 6th); *United States* v. *Vassallo,* 181 F. 2d 1006 (C.A. 3d); *United States* v. *Venuto,* 182 F. 2d 519 (C.A. 3d).

The cases which rely on the net worth increase method are all in agreement as to the requisites for successful prosecution. There must be, of course, proof of actual increases in net worth. Furthermore, in order that the increases may be considered as *current* income, the Government must show a

source of income to account for them and it must offer evidence tending to establish the soundness of its net worth starting point.

All of the aforementioned conditions for successful prosecution have been met in this case. Petitioner's attack upon the correctness of the net worth ingredients relates at best only to the weight to be given the Government's net worth computation, not its admissibility. Even if the computation were not wholly correct in all of its details, the judgment of conviction must be sustained if the jury considered it to be substantially correct. *United States* v. *Ragen,* 314 U. S. 513, rehearing denied, 315 U. S. 826; *United States* v. *Johnson,* 319 U. S. 503, 517-518, rehearing denied, 320 U. S. 808.

There is ample evidence of a source of income to account for the increases in net worth. It was shown that petitioner was an auctioneer doing business in corporate and individual capacities. His personal returns for the years in question showed net income ranging from approximately $11,000 to $18,000, respectively. The Government was not required to prove specific items of unreported income in order to establish a source; it was sufficient to show a possible source of the funds responsible for the net worth increases. *United States* v. *Chapman, supra.*

Petitioner contends (1) that the Government here relies upon a naked net worth analysis, with-

out any substantial evidence relating to his net worth at the beginning of the indictment period and (2) that the opinion below is therefore in conflict with the *Bryan* and *Fenwick* decisions. Both contentions are without merit. As to the net worth analysis, the evidence reveals a comprehensive investigation of petitioner's assets and liabilities, showing increases in net worth of approximately $58,000, $34,000 and $25,000, respectively, in the years involved. In considering the substantiality of the starting point net worth, it must be remembered that petitioner did not offer any testimony in this case. The Government, however, proved that a copy of its starting point net worth statement was made available to petitioner's accountant, but that petitioner made no claim that he possessed assets other than those shown on the statement. The Government's agent testified that petitioner had made the following admissions: that he had not received any gifts or inheritances, but that everything he touched "seemed to turn to gold" during the years in question (R. 48); that monies used by his wife were furnished to her by him (R. 28); that with reference to cash on hand in 1942, 1943, 1944 and 1945, he would get small amounts which were not sufficient for making deposits (R. 101-103). Petitioner contended, during an interview with the examining agent approximately six months after the investigation had begun, that he had other available assets in the

form of alleged gifts from his mother to his wife and children (R. 48-51) and that the money was kept in a small safe on the top floor of his business premises (R. 78). However, it was proved that during each of the indictment years petitioner claimed his children and his mother as dependents. (R. 7-8.) In his 1943 return petitioner stated that his mother was "incapable of self-support". (R. 49.) It is submitted that all of this testimony, particularly in the absence of any defense explanation, established a net worth starting point sufficiently substantial to permit the case to go to the jury. *Abrams* v. *United States,* 250 U. S. 616, 619; *Curley* v. *United States,* 160 F. 2d 229 (C. A. D. C.).

As pointed out by the court below, the *Bryan* and *Fenwick* cases are distinguishable on their facts. For example, in the *Bryan* case, 175 F. 2d at 226, the court found that the Government's witness had "frankly admitted that he did not know whether his computation contained all the assets of the Defendant or not". The *Fenwick* opinion, p. 491, calls attention to certain specific instances in which "the evidence falls far short of proof that the property which the government agents assumed constituted all of defendant's net worth at the beginning * * * was in fact all of the property then owned by him".

2. The trial court's restriction of cross examination by petitioner's counsel does not warrant

exercise of the supervisory power of this Court. Petitioner did not present any direct testimony on his own behalf. It is apparent, as the court of appeals has stated, that petitioner "endeavored to prove his case through cross examination of the witnesses and was not allowed, in a number of instances, to go outside the scope of the direct examination". (R. 268.) For the reasons given in the opinion below (R. 268-9) we think that such limitations on cross-examination as were imposed were entirely proper.

CONCLUSION

The decision of the court below is plainly correct and there are no conflicts of decision. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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